STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

LINDA EVANSWOOD,

Plaintiff,

vs. Case No. 2005-1210-CB

JOHN M. EVANS, STEWART T. EVANS, STU EVANS AUTOMOTIVE GROUP, INC., a Michigan corporation, EVANS REAL ESTATE HOLDINGS, LLC, a Michigan Limited Liability Company, and CONTINENTAL INVESTMENTS, LLC, a Michigan Limited Liability Company,

Defendants.

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OPINION AND ORDER

Defendant Stu Evans Automotive Group moves for summary disposition of plaintiff's complaint.

Plaintiff, a minority shareholder in Stu Evans Automotive Group ("Automotive Group"), filed a complaint against defendants on March 24, 2005. The crux of plaintiff's complaint is that defendants John M. Evans, the majority shareholder in Automotive Group, and Stewart T. Evans, a minority shareholder in Automotive Group, allegedly engaged in misuse of Automotive Group finances through or in conjunction with the remaining defendants. Plaintiff expressly asserted that Automotive Group finances were used to fund ventures/purchase items for the personal benefit of John M. Evans and Stewart T. Evans, that the same were used without the knowledge of the corporation or its other shareholders, and that Automotive Group records were deficient and/or falsified to conceal such activities. The specific causes of action brought by Plaintiff included breach of the fiduciary duties of care, loyalty and good faith; violation of corporate

statutory duties; fraud; conversion; and civil conspiracy. Plaintiff thus sought not only damages in her complaint, but an accounting, attorney fees, and injunctive relief as well.

On May 2, 2005, Automotive Group filed a motion for stay of proceedings, which this Court denied on May 20, 2005. On May 27, 2005, Automotive Group filed both a motion for reconsideration of the May 20, 2005, order and a motion for partial summary disposition based on the statute of limitations. In an *Opinion and Order* dated October 5, 2005, the Court denied both motions. Defendant Automotive Group moved for reconsideration, which was denied in an *Opinion and Order* dated October 27, 2005. Discovery remains open in this case until October of 2006. Defendant Automotive Group now moves for summary disposition.

Defendant Automotive Group asserts in its motion for summary disposition that this case is a derivative shareholder proceeding, initiated by a 12% minority shareholder of the corporation. Defendant contends that pursuant to MCL 450.1495(1) the Court shall dismiss a derivative proceeding if it finds that one of groups specified in subsection 2 has made a determination in good faith, after conducting a reasonable investigation, that the maintenance of the derivative proceeding is not in the best interests of the corporation. Subsection 2 allows such determination to be made by, among others, a majority of the disinterested directors, if the disinterested directors constitute a quorum at a meeting of the board. Defendant asserts that in this case, the three disinterested directors, who constitute a quorum of the board, have conducted a reasonable investigation and have unanimously determined, in good faith, that the maintenance of the derivative proceeding is not in the best interests of the corporation. Further, defendant contends that none of the factual allegations in plaintiff's complaint allege any injuries other than those sustained by the corporation as a whole, nor does plaintiff seek any relief other than derivative relief. Therefore, defendant contends, the entire complaint must be dismissed

pursuant to MCR 2.116(C)(8). Further, defendant asserts, there is no genuine issue of material fact that the allegations lack factual support, supporting judgment for defendant pursuant to MCR 2.116(C)(10).

Plaintiff responds, by way of background, that in late 2004, the Automotive Group appointed a board member to investigate the allegations in plaintiff's complaint. Plaintiff contends the board member hired the accounting firm of Yeo & Yeo to conduct a forensic accounting analysis, culminating in the "2005 Report," which did not conclude that the lawsuit was not in the best interests of the corporation. Plaintiff contends that shortly thereafter the board members held a secret meeting in which it appointed three directors to undertake a new, do-over investigation. Plaintiff contends those board members were involved the allegations in her complaint. Plaintiff further contends they performed a conclusory investigation without any outside help from a law firm or accounting firm, before issuing the "2006 Report," providing that a lawsuit was not in the best interest of the corporation. Further, plaintiff asserts this Court previously determined that she not only brings a derivative count but a direct count as well.

Plaintiff argues, first, that the Automotive Group has not met its burden of proving that it conducted a reasonable investigation and made a good faith determination that the derivative count is not in the best interests of the Automotive Group. Plaintiff contends the "good faith" element is not established because the procedures, the choice of investigators, the lack of an investigation on the most critical issues, etc., raises questions as to whether the investigation was a complete sham. Among other points, plaintiff asserts that the 2005 Report was kept hidden until this Court granted plaintiff's emergency motion to compel same. Similarly, plaintiff contends the Automotive Group's investigation cannot be considered reasonable. Here, plaintiff further contends that the Automotive Group's reliance on the business judgment rule is

misplaced. Second, plaintiff argues that her non-1541a claims are not subject to summary judgment under MCL 450.1495. Here, plaintiff asserts that not all of her claims are derivative in nature, and that her 1489 claim is not subject to MCL 450.1495.

In reply brief, defendant Automotive Group asserts, first, that plaintiff's challenge to good faith was a foregone conclusion, i.e., she accused Mr. Pankopf of not being disinterested before the investigation began. Automotive Group asserts that all three disinterested directors have impeccable credentials, as seen in their resumes. Automotive Group further asserts that plaintiff herself refused to cooperate in the investigation, although she was invited to. Defendant maintains plaintiff's arguments pertaining to good faith fail. Automotive Group asserts that the 2005 Report did not result in a recommendation regarding dismissal or non-dismissal of the litigation, leaving that up to the Board. Automotive Group asserts that recommendations from the 2005 Report were adopted, while the 2006 Report was a culmination of further investigation. Defendant contends that Michigan law defines "disinterested" director as one who is not party to the suit. In response to plaintiff's argument that the 2006 Report was cursory and failed to investigate certain matters, defendant asserts that the directors reviewed what really mattered. Regarding items in the 2006 Report that plaintiff said were "misrepresentations," defendant argues plaintiff calls any conclusions she does not like "misrepresentations." Finally, with regard to the 1489 claim, defendant notes plaintiff does not dispute that she seeks recovery for the corporation, not merely herself, evincing she has no direct claim.

In surreply, plaintiff assets that the credentials of the alleged disinterested directors is beside the point. Plaintiff contends what is germane is whether they have conflicts of interest and divided loyalties raising issues of material fact as to whether the investigation was carried out in good faith and whether it was reasonable for them to elect themselves to conduct it.

Second, plaintiff avers she does not dispute that the directors meet the definition of "disinterested," but this still does not mean that they conducted the investigation in "good faith." Third, with regard to the statement that she was invited to participate but chose not to, plaintiff responds that she did not wish to participate in the investigation herself because she wanted it to be completely neutral and independent, with no outside influences. Plaintiff maintains the Automotive Group kept the 2005 Report hidden from the Court and plaintiff, and only Mr. Evans was permitted to address the Board, persuading them to conduct another investigation. Fourth, plaintiff contends defendant ignores case law, and, further, plaintiff asserts that no court addressing the issues of good faith and reasonableness has found that a lawsuit was not in the best interest of a corporation in circumstances similar to those present here. Fifth, plaintiff contends that while defendant asserts it ignored certain witnesses as being "low level employees," the directors simply deliberately ignored the evidence. Finally, plaintiff contends that while Automotive Group asserts that she has not supplied the Court with any information of substance which was not already considered by the disinterested directors, this is not true, as set forth in the affidavit of Kim Brown.

In response to the surreply, defendant Automotive Group contends that the directors passed the test of "disinterested director" set forth by the law, and the Court should determine whether or not they acted in good faith by reference to their investigation, not their status as directors. Further, defendant contends plaintiff fails to provide any facts to substantiate her conclusions that the disinterested directors had "conflicts" and "divided loyalties." Defendant maintains that the directors considered everything which plaintiff also considered. Finally, defendant reiterates that plaintiff has not stated a claim for shareholder oppression under MCL 450.1489.

Defendants John and Stewart Evans have filed a concurrence with the current motion, and plaintiff has responded. The respective arguments therein are redundant with the arguments made by the primary parties to this motion.

Defendant Automotive Group moves for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). A motion brought under MCR 2.116(C)(8) tests the sufficiency of the complaint on the basis of the pleadings alone. *By Lo Oil Co v Department of Treasury*, 267 Mich App 19, 26; 703 NW2d 822 (2005). The trial court must grant the defendant's motion if no factual development could justify the asserted claim for relief. *By Lo Oil*, 26. A (C)(10) motion tests the factual sufficiency of a complaint and must be supported by affidavits, depositions, admissions, or other documentary evidence. The moving party must specifically identify the undisputed factual issues and support its position with documentary evidence. *By Lo Oil*, 26. The trial court is required to consider the submitted documentary evidence in the light most favorable to the party opposing the motion. *By Lo Oil Co*, 26. If the moving party satisfies its burden of production, the motion is properly granted if the opposing party fails to proffer legally admissible evidence that demonstrates that a genuine issue of material fact remains for trial. *By Lo Oil Co*, 26-27.

The Court will first address whether plaintiff states a direct claim against the corporation in her complaint, as contemplated by MCL 450.1489. MCL 450.1489(1), which allows a shareholder to bring an action "to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive **to the corporation *or* to the shareholder.**" (Emphases added.) Subsection 489(3) defines "willfully unfair and oppressive conduct" as "a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder."

Despite plaintiff's enumerating a claim for MCL 450.1489, defendant Automotive Group contends that her complaint is derivative only. Defendant asserts that the complaint alleges nothing but facts causing harm to the corporation, rather than to plaintiff herself individually, and that plaintiff only seeks relief for the corporation. Defendant contends this manner of pleading is fatal to plaintiff's direct claim. The Court does not agree.

As set forth above, pursuant to the plain language of this statute, it is clear plaintiff is entitled to bring a direct action to establish that those in control of the corporation have committed unfair and oppressive acts either to the shareholder or to the corporation. The United States District Court, Eastern Division, for the State of Michigan recently considered this issue in *Bromley v Bromley*, 2006 WL 1662552 (ED Mich 2006) (decided June 7, 2006). There, as here, defendants directed the Court to various caselaw regarding shareholder derivative suits, stating that, ordinarily, shareholder suits alleging damage to the corporation must be brought derivatively, in an attempt to have the Court ignore the plain language of MCL 450.1489. However, the case law referenced by defendant Automotive Group in this case pertaining to this issue does not address the plain language of 1489 nor the Michigan Court of Appeals interpretation of same in *Estes v Idea Engineering & Fabrications, Inc,* 250 Mich App 270, 278; 649 NW2d 84 (2002).

In *Estes*, a special panel of the Court of Appeals was convened to resolve conflict between *Estes v Idea Engineering & Fabrications, Inc*, 245 Mich App 328; 631 NW2d 89 (2001), vacated in part, 245 Mich App 328; 631 NW2d 89 (2001), and *Baks v Moroun*, 227 Mich App 472; 576 NW2d 413 (1998). In reviewing the statute, the *Estes* Court (2002) definitively ruled as follows:

> It is the judgment of this Court that § 489 is quite clear in its mandate: § 489 creates a statutory cause of action along with flexible discretionary remedies to shareholders of

> closely held corporations. ***Moreover, it is clear that this statutory cause of action for "oppression" in favor of minority shareholders who are abused by "controlling" persons, is a direct cause of action, not derivative,*** and though similar to a common-law shareholder equitable action, provides a separate, independent, and statutory basis for a cause of action. We come to this conclusion on the basis of the plain reading of the statute. Moreover, we note . . . that MCL 450.1103 of the MBCA states, in pertinent part, that the act " 'shall be liberally construed . . . (c) [t]o give special recognition to the legitimate needs of close corporations.' "

The *Estes* Court, extensively citing the dissent of Judge Hoekstra in *Baks* and adopting it as its own, also explained:

> The inclusion of the jurisdiction and venue provisions in § 489(1) indicates . . . that the Legislature was establishing a new and separate cause of action for shareholders in closely held corporations. . . . [T]he unique characteristics of a suit brought pursuant to § 489 compel this construction.
>
> This Court is required to look at the object of the statute, the harm it is designed to remedy, and apply a reasonable construction that best accomplishes the purpose of the statute. In general, a closely held corporation differs from a publicly held corporation in two ways. The most obvious difference is that a shareholder who may pursue a suit under § 489 is unable to escape an oppressive situation by dispensing with shares of ownership in the public arena. Instead, the shareholder seeking relief is required to seek a judicial dissolution of the closely held corporation or another remedy within the statute. A second obvious difference is that the shareholders of a closely held corporation participate in the management of the corporation, whereas the management of a publicly held corporation represents the shareholders. One tool of a dissatisfied shareholder in a publicly held corporation is the ability to bring a lawsuit against a director. . . .
>
> Not only are the purposes of a § 489 suit different from a § 541 a [breach of fiduciary duties] suit, but many concrete differences between the two suits also exist. First, as already stated, suits brought pursuant to §§ 489 and 541a redress different injuries. ***A § 489 suit seeks to redress oppression that injures either the corporation or the shareholder,*** whereas a § 541 a suit seeks to redress wrongs to the corporation. Second, a suit brought pursuant to § 489 is decided differently from a suit brought pursuant to § 541a. . . . Third, §§ 489 and 541a suits involve different parties. The defendants in a § 489 suit may be either the directors or "those in control of the corporation," whereas the defendants in a § 541 a suit are only the directors or officers who have breached their fiduciary duty of care. Application of § 492a of the act, M.C.L. § 450.1492a; MSA 21.200(492a), to § 541 a means that the plaintiffs in a § 541 a suit may be either current or former shareholders, whereas the plaintiffs in a § 489 suit may only be current shareholders. Last, the parties in §§ 489 and 541a suits arrive in different procedural postures. ***The plaintiffs in a § 489 suit may represent themselves and other similarly situated shareholders and bring their suits as individual or direct actions.*** The plaintiffs

in § 541 a suits typically represent the corporation and bring their suits as derivative actions pursuant to § 492a.

Estes, 280-283 (citations omitted).

The Court in *Bromley, supra*, relied on this language in concluding that its plaintiff's complaint, alleging numerous claims of the mismanagement of the corporation resulting in harm both to the corporation and to the interests of the shareholders, satisfied the basic standing requirement of § 489. *Bromley*, slip op 4. The *Bromley* Court opined:

> [R]egarding the legal question of whether Plaintiffs are entitled to bring an action for harms to the corporation under § 489(3), the Court believes that Plaintiffs are entitled to bring such an action. [] § 489(1) specifically permits an action for "willfully unfair and oppressive [conduct] to the corporation or to the shareholder." Under Defendants' interpretation of § 489, which would not permit a direct action for harm to the corporation, § 489(1)'s reference to unfair and oppressive conduct "to the corporation" would be rendered meaningless. As a further contradiction to Defendants' position, the Michigan Court of Appeals addressed this precise issue in *Estes* when it stated that "[a] § 489 suit seeks to redress oppression that injures either the corporation or the shareholder." *Estes, supra*, at 282. As discussed above, *Estes* also clarified that a § 489 action is a direct action and not a derivative action. *Estes,* 284. *Bromley*, slip op 5.

The Court finds *Bromley's* analysis of the pertinent statute and case law persuasive. Again, plaintiff has the right to bring a direct action. The statute plainly allows her to bring an action based on harm to the corporation. The Court does not find fatal plaintiff's wording in the complaint that she seeks redress for harm to the corporation. Nor is the Court persuaded that plaintiff loses her direct cause of action because she seeks repayment to the corporation as relief. Therefore, the Court is not persuaded that it would be appropriate to dismiss plaintiff's complaint in its entirety, whatever the Court would find regarding the derivative claims.

Next, the Court is not persuaded to grant summary disposition of the derivative claims at this point. MCL 450.1495 provides:

> (1) The court shall dismiss a derivative proceeding if, on motion by the corporation, the court finds that 1 of the groups specified in subsection (2) has made a determination

in good faith after conducting a reasonable investigation upon which its conclusions are based that the maintenance of the derivative proceeding is not in the best interests of the corporation. If the determination is made pursuant to subsection (2)(a) or (b), the corporation shall have the burden of proving the good faith of the group making the determination and the reasonableness of the investigation. If the determination is made pursuant to subsection (2)(c) or (d), the plaintiff shall have the burden of proving that the determination was not made in good faith or that the investigation was not reasonable.

(2) A determination under subsection (1) may be made by any 1 of the following:

(a) By a majority vote of the disinterested directors, if the disinterested directors constitute a quorum at a meeting of the board.

(b) By a majority vote of a committee consisting of 2 or more disinterested directors appointed by a majority vote of disinterested directors present at a meeting of the board, whether or not the disinterested directors constitute a quorum at the meeting.

(c) By a panel of 1 or more disinterested persons appointed by the court upon motion by the corporation.

(d) By all disinterested independent directors.

In this case, defendant corporation moves for dismissal based on a determination made pursuant to subsection 2(a). Therefore, defendant has the burden of proving the good faith of the group making the determination and the reasonableness of the investigation.

In this case, the Court is not persuaded that it can determine on the face of the pleadings and exhibits that the determination was made in good faith and that the investigation was reasonable. For example, plaintiff has attached the affidavit of her accountant, Kim Brown, who swears that she has reviewed the thousands of pages of pertinent documents and transcripts in this case. Ms. Brown testifies that the initial 2005 Report, prepared by an outside accounting firm, only investigated three areas of plaintiff's complaint, yet verified that some $9,000,000 was taken by defendant John Evans and his family. (Pl Ex 1). Ms. Brown further sets forth other conclusions in the 2005 report, which differ from the 2006 Report prepared by the "disinterested directors." Ms. Brown concludes the 2006 Report is conclusory and deficient in its particulars. As set forth in discussing the parties' arguments, there are numerous points and counterpoints made by the parties. The Court is persuaded there are clearly questions of credibility as well as

findings of fact that need to be resolved by the trier of fact. Without resolved facts, the Court cannot come to the greater conclusion that the determination was made in good faith after a reasonable investigation. The Court further notes that discovery has not yet closed in this case.

For the foregoing reasons, defendant's motion for summary disposition is DENIED. In compliance with MCR 2.602(A)(3), the Court states this *Opinion and Order* does not resolve the last pending claim or close this case.

IT IS SO ORDERED.

Dated: July 31, 2006

DONALD G. MILLER
Circuit Court Judge

CC: Michael S. Leib
Eric L. Yaffe
Joseph P. Puzzuoli
James E. Tamm
Keefe A. Brooks
Hans H. J. Pijls

DONALD G. MILLER
CIRCUIT JUDGE

JUL 31 2006

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BY: _____ Court Clerk